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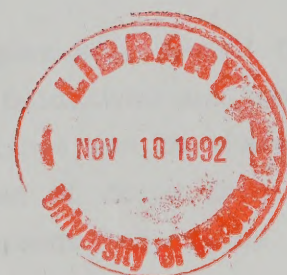
Background Paper

BP-287E

**THE OLDMAN RIVER DECISION
OF THE SUPREME COURT OF CANADA**

Monique Hébert
Law and Government Division

February 1992



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THE OLDMAN RIVER DECISION
OF THE SUPREME COURT OF CANADA

INTRODUCTION

In a judgment handed down on 23 January 1992 in the case of *Friends of the Oldman River Society v. Canada*, a majority of the Supreme Court of Canada held that, under the terms of the federal *Environment Assessment and Review Process Guidelines Order* (hereinafter the "Guidelines"), the federal Minister of Transport was required to conduct an environmental impact assessment with respect to Alberta's Oldman River dam project.

In reaching this decision, the Court, although divided on the actual disposition of the case, was unanimous in holding that the Guidelines were not mere administrative directives, but that they had the force of law and, consequently, had to be complied with in all cases to which they applied. The Court was also unanimous in upholding the constitutional validity of the Guidelines.

The importance of this case, however, goes well beyond the Court's ruling as regards the constitutionality of the Guidelines and their application to the Oldman River dam project. Guidelines can be changed and, indeed, the federal government is in the process of doing this by means of Bill C-13, the Canadian Environmental Assessment Act, which is currently before the House of Commons at the stage of third reading.

If this bill is enacted, the Court's findings that relate specifically to the Guidelines may soon be outdated, as the new legislation may contain materially different positions. There are, however, at least two aspects of the judgment that are bound to retain their significance in the years to come. The first has to do with the Court's liberal interpretation of what comprises the "environment" and "environmental quality." The second deals with the Court's assessment of

how far each level of government can go in enacting measures relating to the environment, while still remaining faithful to the constitutional division of powers. To a large measure, it is in relation to these two aspects of the judgment that the Oldman River case is being hailed as a landmark ruling in the area of environmental law.

BACKGROUND

After considerable study that spanned a period of more than two decades, the government of Alberta announced in 1984 that it would proceed with the construction of a dam on the Oldman River, at the Three Rivers site. This announcement led to further studies by both the federal and provincial governments, and a number of public meetings were held by the provincial government to consider what impact the dam might have on such things as land use, fish, wildlife, recreation and agriculture. In 1986, the Alberta government also made an application to the federal Minister of Transport, who, under the federal *Navigable Waters Protection Act*, must give approval for any work built in navigable waters. After making an assessment of the project's effect on marine navigation, the Minister in the following year gave his approval, subject to certain conditions regarding navigation. No environmental impact assessment was conducted under the federal Guidelines, however, even though these had been in place since 1984.

It was only after this approval was granted that the respondent Society, the Friends of the Oldman River Society, officially came into the picture.

Incorporated in 1987, this Society made every effort to block the Oldman River dam project from going ahead. It petitioned two federal Ministers to conduct a review in accordance with the federal Guidelines. The Minister of Fisheries and Oceans declined to act, however, on the grounds that potential problems were being addressed and because of the "long-standing administrative arrangements that are in place for the management of fisheries in Alberta." The Minister of the Environment also declined to act, principally on the grounds that the dam project fell



primarily within provincial jurisdiction and that the Department of the Environment was satisfied that Alberta's proposed mitigation plan would remedy any detrimental effects on the fisheries.⁽¹⁾ The Society also brought several actions in the Alberta courts in the hope of blocking the project, but it was equally unsuccessful on this front. Finally, the Society commenced proceedings in the Federal Court of Canada in 1989, even though, at this point, the dam was 40% complete.

The case of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, which was decided by the Federal Court of Canada (Trial Division) on 10 April 1989, served as a major impetus for legal action to be taken in relation to the Oldman River dam project; proceedings in Alberta were commenced a mere 11 days after the decision was handed down in the Canadian Wildlife Federation case.⁽²⁾ At issue in the Canadian Wildlife Federation case was the province of Saskatchewan's controversial plan to build two dams (Rafferty and Alameda) within the Souris River Basin, a system that flows south into North Dakota and then northward into Manitoba. Under the terms of the *International River Improvements Act*, the federal Minister of the Environment had issued a licence allowing the works to be carried out within the river basin. This action prompted the Canadian Wildlife Federation to commence proceedings against the Minister, asking that the licence be quashed and that the Minister be required to comply with the Guidelines. Holding that these Guidelines were statutory in nature and thus created enforceable rights, and that they were mandatory in all cases to which they applied, Mr. Justice Cullen allowed the action and ordered the sought-after relief. On appeal, this judgement was unanimously upheld by the Federal Court of Appeal, which handed down its decision several months later.⁽³⁾

The Oldman River case, therefore, was not the first case in which the Guidelines were scrutinized and given a broad interpretation.

(1) The Society apparently did not request the Minister of Transport to conduct a review under the Guidelines; it was not until later that it discovered that this Minister had approved the project.

(2) [1989] 3 F.C. 309 (T.D.)

(3) [1989] 99 N.R. 72.

Though the Canadian Wildlife Federation case had already set the precedent in this regard, that case was not appealed to the Supreme Court of Canada, so that there was still some uncertainty about the actual legal status and application of the Guidelines. These questions were finally laid to rest by the Supreme Court of Canada in the Oldman River case.

In this action, the Society sought an order in the nature of *certiorari* to quash the approval granted by the Minister of Transport, and an order in the nature of *mandamus* requiring this Minister and the Minister of Fisheries and Oceans to comply with the Guidelines. The action was dismissed in the Trial Division of the Federal Court,⁽⁴⁾ but the Society's appeal to the Federal Court of Appeal was successful and that Court unanimously granted the sought-after relief.⁽⁵⁾ Six months later, leave to appeal was granted by the Supreme Court of Canada, and by the time the case was argued before that Court in February 1991, intervenor status had been accorded to six additional provincial governments and one territorial government, as well as to a number of native associations and environmental groups.

At the request of the Alberta government, the Supreme Court of Canada was specifically asked to rule on the constitutional validity of the federal Guidelines. This issue had not been argued in the Federal Court; it was raised for the time in the Supreme Court of Canada.

REASONS FOR JUDGMENT

A. The Statutory Validity of the Guidelines

In a judgment written by Mr. Justice La Forest, the Court first upheld the statutory validity of the Guidelines, and confirmed their binding and mandatory nature. It found that, despite their title, the Guidelines were not purely administrative directives, as contended by the government of Alberta. Rather, they had the force of law, and were

(4) [1990] 1 F.C. 248.

(5) [1990] 2 F.C. 18.



enforceable as such in the courts, since under their enabling legislation - i.e., section 6 of the *Department of the Environment Act* - the Guidelines had to be formally enacted by "order," with the approval of cabinet.

The Court also disagreed with Alberta's contention that, by calling for socio-economic considerations to be taken into account by the relevant decision makers, the Guidelines far exceeded the authority conferred under the above-noted Act to establish guidelines for the purposes of carrying out the Minister's duties relating to "environmental quality." Characterizing Alberta's interpretation of "environmental quality" as "unduly myopic," since it was limited to biophysical elements alone, the Court emphasized that the "environment" was a diffuse subject-matter, and stated that, subject to the constitutional imperatives, consideration of such things as the potential consequences for a community's livelihood, health and other social matters engendered by environmental change was surely an integral part to decision-making on matters affecting environmental quality.

Finally, the Court was unconvinced by the argument advanced by both the federal government and the government of Alberta that, by requiring the decision maker to take environmental factors into consideration, the Guidelines were inconsistent with, and therefore had to yield to, the requirements set out under the *Navigable Waters Protection Act*, which were limited exclusively to considerations pertaining to marine navigation. In rejecting this argument, the Court held that the duties imposed under the Guidelines were not in any way in conflict with those prescribed under the Act. Rather, the former were to be regarded as supplemental to the latter, and the Minister could not escape his obligations under the Guidelines by resorting to an excessively narrow interpretation of the authority conferred upon him under the Act.

B. Applicability of the Guidelines Order and Crown Immunity

The second series of issues considered by the Court involved a determination on which projects or undertakings were in fact subject to the Guidelines, such as to "engage the process," i.e., the environmental impact assessment and review process.

Noting that the Guidelines were not restricted to "new federal projects, programs and activities," and stating further that the process was not engaged every time a project had an environmental effect on an area of federal jurisdiction, the Court held that, in order for the process to be engaged within the meaning of the Guidelines, there first had to be a "proposal" which required "an initiative, undertaking or activity for which the Government of Canada has a decision making responsibility." In the Court's view, such a "decision making responsibility" existed wherever, by the terms of a federal statute enacted under the authority of section 91 of the *Constitution Act, 1867*, there was a legal duty or responsibility to act in relation to a proposal. If an "affirmative regulatory duty" was found to exist under relevant federal legislation, it was then a matter of identifying the "initiating department" assigned the task of performing the duty and of deeming this initiating department the "decision making authority" for the proposal, thereby triggering the application of the Guidelines.

Based on the foregoing interpretation, the Court held that, in in this particular case, the Minister of Transport had the requisite "affirmative regulatory duty" to act under the *Navigable Waters Protection Act*, for, by the terms of this statute, his approval was required for any work that might substantially interfere with navigation. By contrast, the Court held that the Minister of Fisheries and Oceans fell short of having the requisite "affirmative duty to act" since, under the *Fisheries Act*, he possessed only a "limited *ad hoc* legislative power."

The Court went on to hold, however, that once the process had been engaged, as was the case here, given the Minister of Transport's powers under the *Navigable Waters Protection Act*, the scope of the assessment to be conducted would not be restricted to the Minister's immediate area of responsibility. Rather, as the initiating department, the Minister was required by the terms of the Guidelines to make an assessment of the environmental effect of the project on all other relevant areas of federal jurisdiction.

A majority of the Court accordingly ordered the Minister of Transport to conduct the requisite environmental impact assessment, not



only as regards any effect the dam might have on the navigability of the Oldman River, but also its possible effect on other areas of federal jurisdiction that were relevant in this case, such as fisheries, Indians and Indian lands.

While concurring with the majority of the Court on its interpretation of the application and scope of the Guidelines, Mr. Justice Stevenson, in a dissenting opinion, did not agree that the Minister of Transport had authority over the province of Alberta. Relying on the doctrine of "Crown immunity," he stated that the Albertan government, as a Crown entity, was not bound by the terms of the *Navigable Waters Protection Act*, since the Act did not specifically state that it applied to the Crown.

This opinion was not shared by the other members of the Court. Noting that the provinces were among those bodies that were likely to engage in projects that might interfere with navigation, the majority of the Court stated that the province, while not expressly bound under the Act, was implicitly bound, as to hold otherwise would mean that the provinces could undermine the integrity of essential navigational networks in Canadian waters, thereby effectively emasculating the legislative purpose of the Act.

C. Constitutional Validity of the Guidelines

The last issue decided by the Court was whether the Guidelines were so sweeping as to offend the provinces' exclusive areas of jurisdiction under section 92 and 92A of the *Constitution Act, 1867*.

In this regard, the province of Alberta argued that the Guidelines were too broad, for they purported to give to the federal government general authority over the environment in such a way as to trench on the province's exclusive legislative domain. In the province's view, Parliament did not have the constitutional authority to regulate the environmental effects of matters largely within the control of a province; in particular, it was incompetent to deal with the environmental effects of provincial works such as the Oldman River dam. The province of Saskatchewan, in turn, characterized the Guidelines as a "constitutional Trojan Horse" that enabled the federal government, on the pretext of some

narrow head of federal jurisdiction, to conduct a far ranging inquiry into matters exclusively within provincial jurisdiction.

The Court was unanimous in upholding the constitutional validity of the Guidelines. Recognizing that the "environment" was not an independent matter of legislation assigned to either level of government under the *Constitution Act, 1867*, and describing it as an "abstruse" matter that did not comfortably fit within the existing division of powers without considerable overlap and uncertainty, the Court stated that, in its generic sense, the environment encompassed the "physical, economic and social environment" and touched several heads of power assigned to the respective levels of government.

It went on to hold that the solution to the problem was first to look at the catalogue of powers under the *Constitution Act, 1867* and to consider how these might be employed to meet or avoid environmental concerns. When viewed in this manner, the Court stated, it could be seen that both levels of government, in the exercise of their respective legislative powers, could affect the environment, either by acting or not acting. It stressed, however, that while both levels of government could act in relation to the environment, the exercise of legislative power had to be linked to an appropriate head of power. It added that, since the nature of the various heads of power differed under the *Constitution Act, 1867*, the extent to which environmental concerns could be taken into account in the exercise of a power might vary from one power to the next.

The Court also remarked that Alberta's characterization of a work, such as the Oldman River dam, as a "provincial project" or an undertaking "primarily subject to provincial regulation" was not particularly helpful in sorting out the respective levels of constitutional authority. What was important, in the Court's view, was to determine whether either level of government could legislate and, while local projects would generally fall within provincial responsibility, federal participation could be required if, as in this case, the project impinged upon an area of federal jurisdiction.

The Court further held that, in enacting legislation in a given area, it was sufficient that the legislative body legislate on that

subject. The practical purpose that inspired the legislation and the implications this body had to consider in making its decision were another matter. Absent a colourable purpose or a lack of *bona fides*, the Court stated that these considerations would not detract from the fundamental nature of the legislation.

Warning against the dangers of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions, the Court stated that the environment comprised all that was around us and, as such, had to be a part of what actuated many decisions of any moment. It held that environmental impact assessment was, in its simplest form, a planning tool that was now generally regarded as an integral component of sound decision-making and, as a planning tool, it had both an information-gathering and decision-making component that provided the decision maker with an objective basis for granting or denying approval for a proposed development.

In the Court's view, the Guidelines did not attempt to regulate the environmental effects of matters within the control of the province, but merely made environmental impact assessment an essential component of federal decision making. The Court emphasized, however, that, because of its "auxiliary" nature, environmental impact assessment could affect only matters that were truly in relation to an institution or activity that was otherwise within federal legislative jurisdiction.

For the purposes of constitutional analysis, the Court stated that the Guidelines could be broken down into two fundamental components. The first component was their substantive aspect, which called for an environmental impact review to be conducted to facilitate decision-making under the federal head of power through which a proposal was regulated. This component could be sustained on the basis that it was legislation in relation to the relevant subject matters listed under section 91 of the *Constitution Act, 1867*. The second component was procedural or organizational in nature, in that it dealt with coordinating the process of assessment by the various departments or agencies areas of responsibility might come into play in relation to any given project. Stating that this component of the Guidelines had as its object the

regulation of how the institutions and agencies of the federal government were to discharge their functions, the Court held that this facet was unquestionably within the jurisdiction of Parliament, either as an adjunct of the particular powers involved or, in any event, was justified under the residuary power regarding peace, order and good government.

Underscoring that the Guidelines essentially constituted an information-gathering process in furtherance of a decision-making function within federal jurisdiction, and that the decision maker was not bound by any recommendations that might be made pursuant to the review, the Court ultimately declared that the Guidelines were *intra vires* Parliament. It held that, in pith and substance, they were nothing more than an instrument that regulated the manner in which federal institutions were to administer their functions and duties. Consequently, they were nothing more than an adjunct of the federal legislative powers affected. In any event, the Court held that they fell within the purely residuary aspect of the "Peace, Order and good Government" power under section 91 of the *Constitution Act, 1867*. It added that any intrusion into provincial matters was merely incidental to the pith and substance of the legislation.

Having unanimously reached the foregoing conclusions with respect to the constitutionality and statutory validity of the federal Guidelines, eight of the nine Justices ordered the Minister of Transport to conduct the prescribed review. Although acknowledging that the dam project was all but complete, by this time, the majority of the Court nevertheless felt that the Guidelines should be complied with, as there might still be time for mitigative measures to be taken to alleviate any adverse environmental effects on areas of federal jurisdiction. In an unusual move, the majority of the Court also awarded costs on a solicitor-client basis to the respondent, Friends of the Oldman River Society.

CONCLUSION

Although the Oldman River case was primarily concerned with assessing the validity and application of the existing federal Guidelines, it laid down a number of important principles that will likely withstand



the test of time and become the yardstick by which existing and future legislative action on the environment will be measured.

In this regard, the judgment clearly established that, under the current constitutional framework, jurisdiction over the environment is not the exclusive preserve of one level of government over the other. Rather, the environment is an "abstruse" matter that touches upon a number of heads of legislative power, both provincial and federal. Consequently, in the exercise of their respective areas of responsibility, each level of government is constitutionally entitled to enact measures to protect the environment, even though such measures might incidentally trench on areas of responsibility belonging to the other. The Court emphasized, however, that in order to be constitutionally unimpeachable, such measures had to be directly linked to an appropriate head of power. Absent a direct link, the measures could not stand.

The judgment also firmly established that, in assessing environmental quality, a broad range of factors can be taken into consideration, since the environment is "comprised of all that is around us..." It is not limited to biophysical elements alone, but encompasses much more, including socio-economic factors. The Court made clear, however, that this broad rule was subject to existing "constitutional imperatives." In other words, although an all-encompassing assessment can be carried out, only those environmental effects that are actually connected to a specific head or heads of power can be considered in the review process. Thus, if, as regards a given project, the only federal head of power that comes into play is Parliament's jurisdiction over "inland fisheries," the only review that would be constitutionally permissible would be a review of the possible environmental effects of the proposed project as it pertains to the fisheries. Provided this constitutional limitation was respected, all environmental effects, be they socio-economic in nature or otherwise, could be validly assessed, assuming, of course, that a comprehensive review of this sort - or any review at all, for that matter - was mandated under the applicable legislation.

This last point bears stressing, for, although there might be clear constitutional authority to enact environmental measures as an

adjunct to one or more specific heads of power, it does not follow that this authority will in fact be acted upon by the relevant legislative body. The Court recognized as much when it stated that "in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting." (emphasis added)

The Oldman River case clearly defined the constitutional parameters within which each level of government can validly enact measures in relation to the environment and, in so doing, it unequivocally established that the federal government could have a significant role in protecting the environment, even with respect to so-called "provincial projects" or undertakings "primarily subject to provincial regulation." It remains to be seen if Parliament will seek to assert its jurisdiction in all cases touching upon an area of federal responsibility. Bill C-13, which is currently before Parliament and can therefore still be amended (or withdrawn), should provide some idea on how far the federal government is prepared to go in doing its share for the environment, within the constitutional parameters for legislative action that were established by the Supreme Court of Canada in Oldman River case.

In addition to any impact this case may have on legislative initiatives, it would also seem to have material implications for the constitutional talks that are currently underway. Indeed, if an agreement is ever reached on a transfer of powers from one level of government to the other, as some have urged, it seems evident that, based on the *Oldman River* case, the corresponding authority to regulate the environment would also be transferred. The constitutional stakes, in short, appear to be considerably greater as a result of this decision. It would no longer simply be a question of transferring a specific head or heads of legislative authority from one jurisdiction to the next. Rather, it would be a question of transferring both the specific power or powers and the concomittant environmental responsibilities.



Background Paper

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INTRODUCTION

In a judgment handed down on 23 January 1992 in the case of *Friends of the Oldman River Society v. Canada*, a majority of the Supreme Court of Canada held that, under the terms of the federal *Environment Assessment and Review Process Guidelines Order* (hereinafter the "Guidelines"), the federal Minister of Transport was required to conduct an environmental impact assessment with respect to Alberta's Oldman River dam project.

In reaching this decision, the Court, although divided on the actual disposition of the case, was unanimous in holding that the Guidelines were not mere administrative directives, but that they had the force of law and, consequently, had to be complied with in all cases to which they applied. The Court was also unanimous in upholding the constitutional validity of the Guidelines.

The importance of this case, however, goes well beyond the Court's ruling as regards the constitutionality of the Guidelines and their application to the Oldman River dam project. Guidelines can be changed, as happened in the case of the Guidelines under consideration in this case. A mere four months after the Supreme Court of Canada handed down its decision, the Guidelines were superseded by Bill C-13, the Canadian Environmental Assessment Act, which was passed on 23 June 1992.

Given the passage of Bill C-13, the Court's findings relating specifically to the Guidelines are now somewhat academic, since the provisions under the replacement legislation differ materially from those of the Guidelines. There are, however, at least two aspects of the judgment that are bound to retain their significance in the years to come. The first has to do with the Court's liberal interpretation of what comprises the "environment" and "environmental

quality." The second deals with the Court's assessment of how far each level of government can go in enacting measures relating to the environment, while still remaining faithful to the constitutional division of powers. To a large measure, it is in relation to these two aspects of the judgment that the Oldman River case is being hailed as a landmark ruling in the area of environmental law.

BACKGROUND

After considerable study that spanned a period of more than two decades, the government of Alberta announced in 1984 that it would proceed with the construction of a dam on the Oldman River, at the Three Rivers site. This announcement led to further studies by both the federal and provincial governments, and a number of public meetings were held by the provincial government to consider what impact the dam might have on such things as land use, fish, wildlife, recreation and agriculture. In 1986, the Alberta government also made an application to the federal Minister of Transport, who, under the federal *Navigable Waters Protection Act*, must give approval for any work built in navigable waters. After making an assessment of the project's effect on marine navigation, the Minister in the following year gave his approval, subject to certain conditions regarding navigation. No environmental impact assessment was conducted under the federal Guidelines, however, even though these had been in place since 1984.

It was only after this approval was granted that the respondent Society, the Friends of the Oldman River Society, officially came into the picture.

Incorporated in 1987, this Society made every effort to block the Oldman River dam project from going ahead. It petitioned two federal Ministers to conduct a review in accordance with the federal Guidelines. The Minister of Fisheries and Oceans declined to act, however, on the grounds that potential problems were being addressed and because of the "long-standing administrative arrangements that are in place for the management of fisheries in Alberta." The Minister of the Environment also declined to act, principally on the grounds that the dam project fell primarily within provincial jurisdiction and that the Department of the Environment was satisfied that Alberta's proposed mitigation plan would remedy any detrimental

effects on the fisheries.⁽¹⁾ The Society also brought several actions in the Alberta courts in the hope of blocking the project, but it was equally unsuccessful on this front. Finally, the Society commenced proceedings in the Federal Court of Canada in 1989, even though, at this point, the dam was 40% complete.

In this action, the Society sought an order in the nature of *certiorari* to quash the approval granted by the Minister of Transport, and an order in the nature of *mandamus* requiring this Minister and the Minister of Fisheries and Oceans to comply with the Guidelines. The action was dismissed in the Trial Division of the Federal Court,⁽²⁾ but the Society's appeal to the Federal Court of Appeal was successful and that Court unanimously granted the sought-after relief.⁽³⁾

It should be noted that, by agreeing with the Society that the Guidelines had the force of law and were therefore binding in applicable cases, the Federal Court of Appeal was not breaking new ground. A similar conclusion had been reached in the earlier case of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, which was decided by the Federal Court (Trial Division) on 10 April 1989⁽⁴⁾ and which, tellingly, was handed down 11 days before the Society launched its action in the Federal Court to block completion of the Oldman River dam.

At issue in the Canadian Wildlife Federation case was the province of Saskatchewan's controversial plan to build two dams (Rafferty and Alameda) within the Souris River Basin, a system that flows south into North Dakota and then northward into Manitoba. Under the terms of the *International River Improvements Act*, the federal Minister of the Environment had issued a licence allowing the works to be carried out within the river basin. This action prompted the Canadian Wildlife Federation to commence proceedings against the Minister, asking that the licence be quashed and that the Minister be required to comply with

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The Oldman River case, therefore, was not the first case in which the Guidelines were scrutinized and held to be enforceable. The Canadian Wildlife Federation case had already set the precedent in this regard. That case, however, was not appealed to the Supreme Court of Canada, so that there was still some uncertainty about the actual legal status and application of the Guidelines.

These questions were finally laid to rest by the Supreme Court of Canada in the Oldman River case. By the time this case was argued before that Court in February 1991, intervenor status had been accorded to six additional provincial governments and one territorial government, as well as to a number of native associations and environmental groups. Furthermore, at the request of the Alberta government, the Supreme Court of Canada was specifically asked to rule on the constitutional validity of the federal Guidelines. This issue was raised for the time in the Supreme Court of Canada; it had not been argued at the Federal Court level.

REASONS FOR JUDGMENT

A. The Statutory Validity of the Guidelines

In a judgment written by Mr. Justice La Forest, the Court first upheld the statutory validity of the Guidelines, and confirmed their binding and mandatory nature. It found that, despite their title, the Guidelines were not purely administrative directives, as contended by the government of Alberta. Rather, they had the force of law, and were enforceable as such in the courts, since under their enabling legislation - i.e., section 6 of the *Department of the*

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process to be engaged within the meaning of the Guidelines, there first had to be a "proposal" which required "an initiative, undertaking or activity for which the Government of Canada has a decision making responsibility." In the Court's view, such a "decision making responsibility" existed wherever, by the terms of a federal statute enacted under the authority of section 91 of the *Constitution Act, 1867*, there was a legal duty or responsibility to act in relation to a proposal. If an "affirmative regulatory duty" was found to exist under relevant federal legislation, it was then a matter of identifying the "initiating department" assigned the task of performing the duty and of deeming this initiating department the "decision making authority" for the proposal, thereby triggering the application of the Guidelines.

Based on the foregoing interpretation, the Court held that, in this particular case, the Minister of Transport had the requisite "affirmative regulatory duty" to act under the *Navigable Waters Protection Act*, for, by the terms of this statute, his approval was required for any work that might substantially interfere with navigation. By contrast, the Court held that the Minister of Fisheries and Oceans fell short of having the requisite "affirmative duty to act" since, under the *Fisheries Act*, he possessed only a "limited *ad hoc* legislative power."

The Court went on to hold, however, that once the process had been engaged, as was the case here, given the Minister of Transport's powers under the *Navigable Waters Protection Act*, the scope of the assessment to be conducted would not be restricted to the Minister's immediate area of responsibility. Rather, as the initiating department, the Minister was required by the terms of the Guidelines to make an assessment of the environmental effects of the project on all other relevant areas of federal jurisdiction.

A majority of the Court accordingly ordered the Minister of Transport to conduct the requisite environmental impact assessment, not only as regards the effect the dam might have on the navigability of the Oldman River, but also the effects it might have on other areas of federal jurisdiction that were relevant in this case, such as fisheries, Indians and Indian lands.

While concurring with the majority of the Court on its interpretation of the application and scope of the Guidelines, Mr. Justice Stevenson, in a dissenting opinion, did not agree that the Minister of Transport had authority over the province of Alberta. Relying on the doctrine of "Crown immunity," he stated that the Albertan government, as a Crown entity, was

not bound by the terms of the *Navigable Waters Protection Act*, since the Act did not specifically state that it applied to the Crown.

This opinion was not shared by the other members of the Court. Noting that the provinces were among those bodies that were likely to engage in projects that might interfere with navigation, the majority of the Court stated that the province, while not expressly bound under the Act, was implicitly bound, as to hold otherwise would mean that the provinces could undermine the integrity of essential navigational networks in Canadian waters, thereby effectively emasculating the legislative purpose of the Act.

C. Constitutional Validity of the Guidelines

The last issue decided by the Court was whether the Guidelines were so sweeping as to offend the provinces' exclusive areas of jurisdiction under section 92 and 92A of the *Constitution Act, 1867*.

In this regard, the province of Alberta argued that the Guidelines were too broad, for they purported to give to the federal government general authority over the environment in such a way as to trench on the province's exclusive legislative domain. In the province's view, Parliament did not have the constitutional authority to regulate the environmental effects of matters largely within the control of a province; in particular, it was incompetent to deal with the environmental effects of provincial works such as the Oldman River dam. The province of Saskatchewan, in turn, characterized the Guidelines as a "constitutional Trojan Horse" that enabled the federal government, on the pretext of some narrow head of federal jurisdiction, to conduct a far ranging inquiry into matters exclusively within provincial jurisdiction.

The Court was unanimous in upholding the constitutional validity of the Guidelines. Recognizing that the "environment" was not an independent matter of legislation assigned to either level of government under the *Constitution Act, 1867*, and describing it as an "abstruse" matter that did not comfortably fit within the existing division of powers without considerable overlap and uncertainty, the Court stated that, in its generic sense, the environment encompassed the "physical, economic and social environment" and touched several heads of power assigned to the respective levels of government.

It went on to hold that the solution to the problem was first to look at the catalogue of powers under the *Constitution Act, 1867* and to consider how these might be employed to meet or avoid environmental concerns. When viewed in this manner, the Court stated, it could be seen that both levels of government, in the exercise of their respective legislative powers, could affect the environment, either by acting or not acting. It stressed, however, that while both levels of government could act in relation to the environment, the exercise of legislative power had to be linked to an appropriate head of power. It added that, since the nature of the various heads of power differed under the *Constitution Act, 1867*, the extent to which environmental concerns could be taken into account in the exercise of a power might vary from one power to the next.

The Court also remarked that Alberta's characterization of a work, such as the Oldman River dam, as a "provincial project" or an undertaking "primarily subject to provincial regulation" was not particularly helpful in sorting out the respective levels of constitutional authority. What was important, in the Court's view, was to determine whether either level of government could legislate and, while local projects would generally fall within provincial responsibility, federal participation could be required if, as in this case, the project impinged upon an area of federal jurisdiction.

The Court further held that, in enacting legislation in a given area, it was sufficient that the legislative body legislate on that subject. The practical purpose that inspired the legislation and the implications this body had to consider in making its decision were another matter. Absent a colourable purpose or a lack of *bona fides*, the Court stated that these considerations would not detract from the fundamental nature of the legislation.

Warning against the dangers of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions, the Court stated that the environment comprised all that was around us and, as such, had to be a part of what actuated many decisions of any moment. It held that environmental impact assessment was, in its simplest form, a planning tool that was now generally regarded as an integral component of sound decision-making and, as a planning tool, it had both an information-gathering and decision-making component that provided the decision maker with an objective basis for granting or denying approval for a proposed development.

In the Court's view, the Guidelines did not attempt to regulate the environmental effects of matters within the control of the province, but merely made environmental impact assessment an essential component of federal decision-making. The Court emphasized, however, that, because of its "auxiliary" nature, environmental impact assessment could affect only matters that were truly in relation to an institution or activity that was otherwise within federal legislative jurisdiction.

For the purposes of constitutional analysis, the Court stated that the Guidelines could be broken down into two fundamental components. The first component was their substantive aspect, which called for an environmental impact review to be conducted to facilitate decision-making under the federal head of power through which a proposal was regulated. This component could be sustained on the basis that it was legislation in relation to the relevant subject matters listed under section 91 of the *Constitution Act, 1867*. The second component was procedural or organizational in nature, in that it dealt with coordinating the process of assessment by the various departments or agencies whose areas of responsibility might come into play in relation to any given project. Stating that this component of the Guidelines had as its object the regulation of how the institutions and agencies of the federal government were to discharge their functions, the Court held that this facet was unquestionably within the jurisdiction of Parliament, either as an adjunct of the particular powers involved or, in any event, was justified under the residuary power regarding peace, order and good government.

Underscoring that the Guidelines essentially constituted an information-gathering process in furtherance of a decision-making function within federal jurisdiction, and that the decision maker was not bound by any recommendations that might be made pursuant to the review, the Court ultimately declared that the Guidelines were *intra vires* Parliament. It held that, in pith and substance, they were nothing more than an instrument that regulated the manner in which federal institutions were to administer their functions and duties. Consequently, they were nothing more than an adjunct of the federal legislative powers affected. In any event, the Court held that they fell within the purely residuary aspect of the "Peace, Order and Good Government" power under section 91 of the *Constitution Act, 1867*. It added that any intrusion into provincial matters was merely incidental to the pith and substance of the legislation.

Having unanimously reached the foregoing conclusions with respect to the constitutionality and statutory validity of the federal Guidelines, eight of the nine Justices ordered the Minister of Transport to conduct the prescribed review. Although acknowledging that the dam project was all but complete, the majority of the Court nevertheless felt that the Guidelines should be complied with, as there might still be time for mitigative measures to be taken to alleviate any adverse environmental effects on areas of federal jurisdiction. In an unusual move, the majority of the Court also awarded costs on a solicitor-client basis to the respondent, Friends of the Oldman River Society.

CONCLUSION

Although the Oldman River case was primarily concerned with assessing the validity and application of the existing federal Guidelines, it laid down a number of important principles that will likely withstand the test of time and become the yardstick by which existing and future legislative action on the environment will be measured.

In this regard, the judgment clearly established that, under the current constitutional framework, jurisdiction over the environment is not the exclusive preserve of one level of government over the other. Rather, the environment is an "abstruse" matter that touches upon a number of heads of legislative power, both provincial and federal. Consequently, in the exercise of their respective areas of responsibility, each level of government is constitutionally entitled to enact measures to protect the environment, even though such measures might incidentally trench on areas of responsibility belonging to the other. The Court emphasized, however, that in order to be constitutionally unimpeachable, such measures had to be directly linked to an appropriate head of power. Absent a direct link, the measures could not stand.

The judgment also firmly established that, in assessing environmental quality, a broad range of factors can be taken into consideration, since the environment is "comprised of all that is around us..." It is not limited to biophysical elements alone, but encompasses much more, including socio-economic factors. The Court made clear, however, that this broad rule was subject to existing "constitutional imperatives." In other words, although an all-encompassing assessment can be carried out, only those environmental effects that are actually

connected to a specific head or heads of power can be considered in the review process. Thus, if, as regards a given project, the only federal head of power that comes into play is Parliament's jurisdiction over "inland fisheries," the only review that would seem constitutionally permissible would be a review of the possible environmental effects of the proposed project as they pertain to the fisheries. Provided this constitutional limitation is respected, all fisheries-related environmental effects, be they socio-economic in nature or otherwise, could be validly assessed, assuming, of course, that a comprehensive review of this sort - or any review at all, for that matter - was mandated under the applicable legislation.

This last point bears stressing, for, although there might be clear constitutional authority to enact environmental measures as an adjunct to one or more specific heads of power, it does not follow that this authority will in fact be acted upon by the relevant legislative body. The Court recognized as much when it stated that "in exercising their respective legislative powers, both levels of government may affect the environment, either by acting *or not acting*" (emphasis added).

The Oldman River case clearly defined the constitutional parameters within which each level of government can validly enact measures in relation to the environment and, in so doing, it unequivocally established that the federal government could have a significant role in protecting the environment, even with respect to so-called "provincial projects" or undertakings "primarily subject to provincial regulation."

By passing Bill C-13 on 23 June 1992, Parliament provided the federal government with broad authority to conduct an environmental assessment in relation to projects having some measure of federal involvement, however limited. This aspect of the proposed legislation came under considerable criticism at the time. Some critics deplored the fact that the bill would allow federal assessments to be carried out on "primarily provincial" projects that had only limited federal involvement. Characterizing the proposed legislation as another "Trojan horse" that would enable the federal government to encroach on areas of provincial jurisdiction, some critics urged that the bill's scope be narrowed to apply to "primarily federal" projects only.

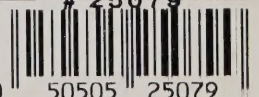
This recommendation was not acted upon; under the new legislation, federal environmental assessments could be carried out on a wide variety of "primarily provincial" projects that only incidentally affected an area of federal jurisdiction - for example, in the case

of a proposed shoe factory (a primarily provincial project) requiring that a power line traverse an existing CN railway line (federal jurisdiction over interprovincial railways that would be incidentally affected).

It should be noted, however, that not every project with some measure of federal involvement may in fact require an environmental assessment. The new *Canadian Environmental Assessment Act* empowers the Governor in Council to pass regulations specifying which types of projects would be subject to review and which would not be. Depending on what regulations are passed in this regard, a variety of otherwise eligible projects could therefore be excluded from the federal review process.

Because the regulations will actually determine when a federal environmental assessment will have to be carried out, their importance cannot be overstated, for it is the regulations more than the legislation itself that will clarify how far the federal government is prepared to go in protecting the environment.

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